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No. 04-748

In the Supreme Court of the United States

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, PETITIONER

v.

ADAM BARBOUR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, because it waived its Eleventh Amendment immunity when it applied for and accepted federal financial assistance.

2. Whether Section 504's waiver provision is a valid exercise of Congress's Spending Clause authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 374 F.3d 1161. The opinion of the district court (Pet. App. 34a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2004. A petition for rehearing was denied on September 1, 2004 (Pet. App. 49a-50a). The petition for a writ of certiorari was filed on November 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794a(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that the text of Section 504 was not sufficiently clear to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845. Section 2000d-7(a) provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794]. * * *
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. 2000d-7(a).

2. In April 1988, respondent Adam Barbour was fired by petitioner Washington Metropolitan Area Transit Authority from his position as a probationary electrician. Pet. App. 2a. Barbour alleges that he was fired because he suffers from bipolar disorder. *Ibid.* Barbour filed suit against petitioner, asserting claims under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, based on petitioner's alleged discrimination against Barbour on the basis of his disability. Pet. App. 3a. Petitioner asserted that it enjoys Eleventh Amendment immunity to Barbour's Section 504 claim and moved to dismiss the claim. *Ibid.*

3. On March 27, 2003, the district court denied petitioner's motion to dismiss the plaintiff's Section 504 claims as barred by the Eleventh Amendment. Pet. App. 34a-48a. The court held that petitioner had waived its sovereign immunity to Section 504 claims by accepting federal financial assistance that was clearly conditioned on such a waiver and that Section 504 was a valid exercise of Congress's Spending Clause authority. *Id.* at 37a-47a.

4. Petitioner filed an interlocutory appeal to challenge the denial of its claim of sovereign immunity. Pursuant to 28 U.S.C. 2403(a), the United States intervened on appeal to defend the constitutionality of the Section 504 waiver provision. The court of appeals affirmed the district court's holding. Pet. App. 1a-19a.

The court found that the plain language of Section 504 and of 42 U.S.C. 2000d-7 puts state agencies on notice that, by accepting federal financial assistance, they waive their immunity under the Eleventh Amendment to private damages suits. Pet. App. 5a-10a. The court also rejected petitioner's contentions that, even if the acceptance of federal funds was clearly conditioned

on a waiver of petitioner's sovereign immunity, petitioner did not "knowingly" waive its immunity to suit under Section 504 by applying for and accepting federal funds, because it believed that a provision of the Americans with Disabilities Act of 1990, 42 U.S.C. 12202, had abrogated its immunity from similar claims under that statute. Pet. App. 10a-14a. Rather, the court found that acceptance of funds that are clearly conditioned on a waiver of Section 504 immunity constitutes a knowing waiver of that immunity. *Id.* at 11a-14a.

Finally, the court rejected petitioner's contention that the conditions Section 504 and 42 U.S.C. 2000d-7 place on the receipt of federal funds are insufficiently related, under *South Dakota* v. *Dole*, 483 U.S. 203 (1987), to the purposes of the federal funding accepted by petitioner to make those statutes valid exercises of Congress's authority under the Spending Clause. Pet. App. 14a-19a. Agreeing with every other circuit that has addressed that issue, see *id.* at 15a, the court noted that the purpose of Section 504 and 42 U.S.C. 2000d-7 was to "[m]ake clear that [Congress] did not want *any* federal funds to be used to facilitate disability discrimination," and that the spending condition "guarantees that federal money is used for the provision of transportation, and nothing else." Pet. App. 15a.

Judge Sentelle dissented. Pet. App. 20a-33a. In his view, Section 504 and Section 2000d-7 are not valid under the Spending Clause, because the conditions those statutes place on fund recipients are not sufficiently related to the purpose of the federal funds.

ARGUMENT

The interlocutory decision of the court of appeals is correct, does not conflict with any decision of this Court,

and does not raise a significant or sustained conflict with any decision of any other court of appeals. This Court has repeatedly denied petitions for certiorari challenging the constitutionality of Section 504 of the Rehabilitation Act and of 42 U.S.C. 2000d-7. See *Pennsylvania Dep't of Corr.* v. *Koslow*, 537 U.S. 1232 (2003) (No. 02-801); *Hawaii* v. *Vinson*, 537 U.S. 1104 (2003) (No. 01-1878); *Chandler* v. *Lovell*, 537 U.S. 1105 (2003) (No. 02-545); *Ohio EPA* v. *Nihiser*, 536 U.S. 922 (2002) (No. 01-1357); *Kansas* v. *Robinson*, 539 U.S. 926 (2003) (No. 02-1314); *Arkansas Dep't of Educ.* v. *Jim C.*, 533 U.S. 949 (2001) (No. 00-1488); see also *George Mason Univ.* v. *Litman*, 528 U.S. 1181 (2000) (No. 99-596) (Section 2000d-7 and Title IX). Those cases presented legal claims virtually identical to those presented by petitioner. Petitioner identifies no reason why its assertion of the same arguments in this petition warrants any different result. Further review is not warranted.

1. Petitioner contends (Pet. 8-13) that Section 504 and Section 2000d-7 are improper exercises of Congress's Spending Clause authority, because the conditions those statutes place on recipients of federal funds are unrelated to the federal interest in the funds.[1]

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[1] Petitioner does not dispute before this Court that, when it applied for and received the federal financial assistance at issue in this case, it had been put on clear notice of the conditions Congress placed on those funds, including the requirement that a state recipient waive its immunity under the Eleventh Amendment. The courts of appeals have uniformly held that Section 2000d-7 unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Nieves-Marquez* v. *Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000); *Nihiser* v. *Ohio EPA*, 269 F.3d 626, 628 (6th Cir.

a. This Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four requirements for valid enactments in exercise of the Spending Power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." *Id.* at 207. Second, if Congress places conditions on the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.* (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, this Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they

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2001), cert. denied, 536 U.S. 922 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820 (9th Cir.), opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001). Even the Second Circuit, which has held that the application of Section 504 to the States was for a time foreclosed for other reasons, see pp. 10-13, *infra*, has not disputed that Section 2000d-7 sufficiently puts States on notice to permit the application of Section 504 in the future. See *Garcia* v. *State Univ. of N.Y. Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001) ("[W]e agree with Garcia that this provision constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity"). Likewise, the vacated panel decision of the Fifth Circuit that adopted the Second Circuit's reasoning in *Garcia* found that Section 2000d-7 clearly conditions the acceptance of federal funds on a State's waiver of its Eleventh Amendment immunity. See *Pace* v. *Bogalusa City Sch. Bd.*, 325 F.3d 609, 615 (5th Cir.) ("Congress enacted § 504 of the Rehabilitation Act pursuant to its authority under the Spending Clause and clearly conditioned the receipt of federal funds on compliance with the Act's provisions."), vacated and reh'g en banc granted, 339 F.3d 348 (5th Cir. 2003).

are unrelated 'to the federal interest in particular national projects or programs.'" 483 U.S. at 207 (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978)). Fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. 483 U.S. at 208. Petitioner claims (Pet. 8-13) that Section 504 and Section 2000d-7 fail to meet the third, "relatedness" requirement.

b. As the courts of appeals have uniformly concluded, see Pet. App. 15a (citing cases), Section 504 and Section 2000d-7 satisfy *Dole*'s relatedness requirement because those statutes further the federal interest in ensuring that no federal funds are used to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services on the basis of disability to qualified persons. Cf. *Sabri* v. *United States*, 541 U.S. 600 (2003) ("Money is fungible," and it "can be drained off here because a federal grant is pouring in there.").

Section 504's nondiscrimination requirement is patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibit race and sex discrimination by "programs" that receive federal funds. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 278 n.2 (1987). Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court held that Title VI was a valid exercise of the spending power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." *Id.* at

569 (citations omitted).[2] The Court reached a similar conclusion in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX, which prohibits education programs or activities receiving federal financial assistance from discriminating on the basis of sex, infringed the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575.

Lau and *Grove City* stand for the proposition that Congress has a legitimate interest in preventing the use of *any* of its funds to "encourage[], entrench[], subsidize[], or result[] in," *Lau*, 414 U.S. at 569 (internal quotation marks omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the receipt of public services, such as race, gender, and disability. Because that interest extends to all federal funds, Congress validly drafted Title VI, Title IX, and Section 504 to apply across the board to all federal financial assistance.[3]

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[2] In *Alexander* v. *Sandoval*, 532 U.S. 275, 285 (2001), the Court noted that it has "rejected *Lau*'s interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond intentional discrimination." The Court did not, however, cast doubt on the Spending Clause holding of *Lau*.

[3] This Court has repeatedly upheld conditions not tied to particular spending programs as valid exercises of Congress's Spending Clause powers. See *Board of Educ.* v. *Mergens*, 496 U.S. 226 (1990) (upholding the Equal Access Act, 20 U.S.C. 4071 *et seq.*, which conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on the schools' not denying "equal access" to students based on the content of their speech); *Oklahoma* v. *United*

The requirement in Section 2000d-7 that a state funding recipient waive its Eleventh Amendment immunity as a condition of accepting federal financial assistance is also related to the same important federal interests. The United States relies on private litigants to assist in enforcing federal programs and, in particular, in enforcing federal nondiscrimination mandates. The requirement that state funding recipients waive their sovereign immunity to suits under Section 504 as a condition of accepting federal financial assistance both (1) provides a viable enforcement mechanism for individuals who are aggrieved by state funding recipients' failure to live up to the promises they make when they accept federal funds and (2) makes those individuals whole for the injuries they suffer as a result of the funding recipient's failure to follow the law.

2. Petitioner contends (Pet. 13-22) that in any event its waiver of immunity upon receipt of federal funds was "unknowing"—and therefore ineffective—because petitioner believed that Congress had already abrogated its immunity to claims under a different law— Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.* Petitioner relies on the Second Circuit's decision in *Garcia* v. *State University of New York Health Sciences Center*, 280 F.3d 98 (2001), which held that a state agency's acceptance of clearly-conditioned funds "alone is not sufficient" to waive immunity, *id.* at 113-114; under *Garcia*, the question is whether the state agency "believed" the waiver would have any

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States Civil Serv. Comm'n, 330 U.S. 127, 144 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management").

practical impact, *id.* at 115 n.5. The Second Circuit in *Garcia* then reasoned that, because "the proscriptions of Title II [of the ADA] and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits [under Section 504], * * * since by all reasonable appearances state sovereign immunity had already been lost [to claims under Title II]." *Id.* at 114 (citation omitted). Further review is not warranted to consider petitioner's *Garcia*-based argument.

a. The court of appeals correctly rejected petitioner's claim. As in other contexts, what must be known for a valid waiver of sovereign immunity to claims under Section 504 is the existence of the legal right to be waived and the direct legal consequence of the waiver, not the practical implications or costs of waiving the right.[4] Since the enactment of Section 2000d-7 in 1986, the plain text of that provision has informed every state agency that acceptance of federal

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[4] See *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."); *Moran* v. *Burbine*, 475 U.S. 412, 421-423 (1986); see also *Patterson* v. *Illinois*, 487 U.S. 285, 294 (1988) (waiver not rendered unknowing simply because a party "lacked a full and complete appreciation of all of the consequences flowing from his waiver") (internal quotation marks omitted); *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. * * * [A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.").

funds constituted a waiver of immunity to suit for violations of Section 504. Neither Section 504 nor Section 2000d-7 was amended or altered by the enactment of Title II of the ADA in 1990, and it has always been clear that plaintiffs could sue under either statute or both statutes. See 42 U.S.C. 12201(b) (preserving existing causes of action); 42 U.S.C. 12202 (ADA provision purporting to abrogate a State's sovereign immunity only to "an action in Federal or State court of competent jurisdiction for a violation of *this chapter*") (emphasis added). A state agency that accepted federal funds thus would have known since 1986 that it was giving up any immunity it might have to suit under Section 504, regardless of whether it believed that it also waived immunity from suit under a distinct statute —the ADA— that imposed similar substantive obligations. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (immunity must be assessed on a claim-by-claim basis).

b. More generally, the Second Circuit in *Garcia* erred in concluding that acceptance of clearly conditioned federal funds may be insufficient to find that a State has waived its immunity. Under this Court's precedents, the existence of a waiver turns on the State's objective manifestation of assent by accepting clearly-conditioned funds. See, *e.g.*, *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (holding that "acceptance of the funds entails an agreement" to funding conditions); *id.* at 678-679 n.2 ("[A] waiver may be found in a State's acceptance of a federal grant."); cf. Restatement (Second) of Contracts §§ 2, 18 (1979) (contractual obligations attach by virtue of manifestation of assent).

Petitioner's subjective beliefs about the consequences of its acceptance of funds are not relevant.

Indeed, after the Second Circuit decided *Garcia*, this Court expressly rejected the contention that the validity of a waiver of sovereign immunity turns on an analysis of a State's subjective intentions and beliefs. In *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002), the State of Georgia did not believe that it was actually relinquishing its right to sovereign immunity when it removed the case to federal court because, under Georgia law, the Attorney General of the State lacked authority to waive the State's sovereign immunity. And under *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the State asserted, it could reasonably believe that, absent that state law authority, no action by the Attorney General in litigation would constitute a valid waiver of the State's sovereign immunity. See *Lapides*, 535 U.S. at 621-622.[5] Nonetheless, this Court held that the removal of the case to federal court was "a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's" immunity. *Id.* at 624. The Court specifically rejected the State's request to examine the State's subjective beliefs and motives in determining whether the State's actions amounted to an unequivocal waiver, explaining that "[m]otives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 621.

The Second Circuit's requirement that courts engage in the difficult evaluation of a State's subjective beliefs and motives before concluding that the State has waived

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[5] In fact, this portion of the holding in *Ford Motor Co.* was good law until this Court overruled it in *Lapides* itself. See *Lapides*, 535 U.S. at 622-623.

sovereign immunity is inconsistent with *College Savings Bank* and with this Court's subsequent teaching in *Lapides*. Petitioner's acceptance of clearly conditioned federal funds constituted a waiver, regardless of petitioner's subjective beliefs or (as in this case) its assessment of the value of the immunity it was waiving in light of an abrogation provision in a statute imposing similar substantive obligations.[6]

c. The D.C. Circuit's decision to follow other courts of appeals in rejecting the *Garcia* rationale does not present a direct or continuing conflict warranting this Court's review.

First, the Second Circuit's decision in *Garcia* predated this Court's decision in *Lapides*. *Lapides* casts such substantial doubt on *Garcia* that review of the *Garcia* rationale in this case, before the Second Circuit has had the opportunity to reconsider its position in light of *Lapides*, would be premature. Likewise, the Second Circuit has not had an opportunity to reconsider

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[6] The court of appeals in the instant case held that, "even if [petitioner's] state of mind were a relevant consideration, the underlying implication of its argument— that it was only [petitioner's] miscalculation about whether its immunity had already been abrogated by the ADA that led it to accept federal funds in 1998—would fail on the facts." Pet. App. 13a. As the court noted, petitioner accepted clearly conditioned federal funds for four years after the enactment of Section 2000d-7 and before the enactment of the ADA, *i.e.*, "four years before [petitioner] could claim that it thought it lost its protection against disability discrimination lawsuits." *Ibid.* Even "counsel for [petitioner] conceded [at oral argument] that 'it is hard to imagine that the Authority would have foregone' the funds in 1998, whatever the impact on its sovereign immunity. * * * It is thus clear that [petitioner's] decision was not based on a miscalculation about the scope of its sovereign immunity, but rather on a reckoning of the value of the financial assistance offered by the federal government." *Id.* at 13a-14a.

Garcia in light of this Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which, contrary to the holding of *Garcia*, concluded that Title II validly abrogated the States' Eleventh Amendment immunity in at least some of its applications.[7]

Second, there is in any event no direct or continuing conflict between the Second Circuit's decision in *Garcia* and the decision of the court of appeals in this case, because the *Garcia* rule is simply a dispute over a transitional rule that will, in short order, be of no further consequence. *Garcia* held that the waiver for Section 504 claims was effective before Title II of the ADA went into effect in 1992, but then lost its effectiveness when Title II took effect. The court recognized, however, that the waiver may well have regained its full effectiveness once again at some point in the late 1990's, when it became clear that Congress's attempted abrogation of sovereign immunity in Title II of the ADA was subject to doubt. See *Garcia*, 280 F.3d at 114 n.4

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[7] Since *Garcia* was decided, no other court of appeals to consider the reasoning of *Garcia* has adopted it as law of the circuit. See, *e.g.*, *Garrett* v. *University of Ala.*, 344 F.3d 1288, 1293 (11th Cir. 2003); *Doe* v. *Nebraska*, 345 F.3d 593, 601-602 (8th Cir. 2003); *M.A.* v. *State-Operated Sch. Dist.*, 344 F.3d 335, 349-351 (3d Cir. 2003). Although a panel of the Fifth Circuit adopted what appears to have been the reasoning of *Garcia* in *Pace* v. *Bogalusa City School Board*, 325 F.3d 609 (2003), that opinion was vacated when the full Fifth Circuit voted to rehear the case en banc, 339 F.3d 348 (2003). In addition, the decisions of two other panels of the Fifth Circuit that had followed the holding in *Pace* were also vacated when the full court voted to rehear those cases en banc as well. See *Miller* v. *Texas Tech Univ. Health Scis. Ctr.*, 330 F.3d 691 (5th Cir.), vacated and reh'g en banc granted, 342 F.3d 563 (5th Cir. 2003); *Johnson* v. *Louisiana Dep't of Educ.*, 330 F.3d 362 (5th Cir.), vacated and reh'g en banc granted, 343 F.3d 732 (2003).

(waiver of immunity to Section 504 claims may become effective again when State had a "colorable basis for the state to suspect" that it had retained its immunity to suit, "because a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity").

Under the *Garcia* rationale, the point at which Section 504 waivers of state sovereign immunity would regain their validity likely occurred by 1997. By that time, this Court had decided *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). After *Seminole Tribe*, and even more so in response to *City of Boerne*, States around the country began challenging the validity of Title II's abrogation, and some courts accepted those arguments. See, *e.g.*, *Brown* v. *North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997); *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), aff'd in part and rev'd in part, 269 F.3d 626 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002). By March 1998, 33 States filed an amicus brief in this Court arguing that *City of Boerne* made it "doubtful" that Congress could have validly abrogated States' Eleventh Amendment immunity to suits under Title II of ADA. Brief of Amici Curiae State of Nevada, et al. at 10, *Commonwealth* v. *Yeskey*, No. 97-634. Accordingly, it appears that the Second Circuit, like the other courts that have addressed the issue, would conclude that a State's waiver of immunity to Section 504 suits is valid for most cases currently being litigated and for all cases that will arise in the future. The dispute between the Second Circuit's view and that of the other courts of appeals affects at most the small and steadily decreasing number of pending Section 504 cases against States

seeking monetary damages that arose between the effective date of Title II of the ADA in 1992 and (at the latest) 1997.

Indeed, as the court of appeals pointed out, petitioner is in a particularly poor position in which to invoke the *Garcia* rationale. In 1997—a year before Barbour's termination, the event that gave rise to this case—petitioner itself in another case "argued * * * that the Court's decision in *Seminole Tribe* had rendered invalid Congress' attempted abrogation of state immunity in the Age Discrimination in Employment Act." Pet. App. 13a. Even the Second Circuit therefore would have concluded that, by the time of the events in this case, petitioner had a "colorable basis * * * to suspect," *Garcia*, 280 F.3d at 114 n.4, that Congress's abrogation of sovereign immunity to claims under Title II of the ADA was ineffective. Accordingly, even under the *Garcia* rationale, petitioner would not be entitled to prevail, and the court of appeals' decision in this case does not present a direct and continuing conflict with *Garcia* that would warrant further review. Moreover, as noted, even the Second Circuit has not considered what significance, if any, the Court's decision in *Tennessee* v. *Lane*, *supra*, has on States' suspicions about the impact of a Section 504 waiver.

3. Petitioner argues (Pet. 19-22) that, aside from the attempted abrogation of state sovereign immunity in the ADA, it could have reasonably believed that its sovereign immunity to Section 504 claims had been abrogated by Section 2000d-7. That contention is also mistaken and, as the court of appeals noted (Pet. App. 14a n.6), has not been accepted by any court. Unlike the ADA—which authorizes suits against States and attempts to abrogate all state sovereign immunity defenses—

Section 504 authorizes suits only against state agencies that receive federal funds,[8] only if the State voluntarily chooses to accept those funds, and only for the duration of the funding period.[9] Those differences are critically important. A state agency could read the ADA and conclude that Congress intended to abrogate its sovereign immunity to ADA claims regardless of any decision or action by the State. But Sections 504 and 2000d-7 are clearly conditional. They have effect if, and only if, the agency voluntarily chooses to accept federal funds. If the state agency does not take the funds, no plausible reading of those provisions would subject the agency to suit under Section 504.

Thus, when it was deciding whether to accept federal funds for the relevant funding year, petitioner's sovereign immunity to Section 504 claims for the coming year was intact, and the agency was faced with a clear choice. It could decline federal funds and maintain its sovereign immunity to suits under the Rehabilitation Act, or it could accept funds and be subject to private suits under Section 504. In choosing to accept federal funds that were clearly available only to those state agencies willing to submit to enforcement proceedings in federal

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[8] Section 504 applies only to States that accept federal funds. See 29 U.S.C. 794a(a)(2) (authorizing suits as part of remedies to "any person aggrieved by any act or failure to act by any *recipient of Federal assistance* * * * under [Section 504]") (emphasis added). Accordingly, under any reasonable interpretation of the statute as a whole, Congress limited its attempted abrogation to those state agencies that receive federal financial assistance.

[9] A state agency is not subject to liability and suit under Section 504 in perpetuity if, at any time, it accepted federal funds. Instead, the state program must be "receiving Federal financial assistance" at the time of the alleged discrimination leading to the lawsuit. See 29 U.S.C. 794(a).

court, petitioner knowingly waived its sovereign immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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